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IN THE

Supreme Court of the United States

October Term, 1960

No. 216

JOSEPH CURCIO and GEORGE BAKER,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners Joseph Curcio and George Baker pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered against them in the above entitled case on June 7, 1960.

Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in the Appendix annexed to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on June 7, 1960. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

Questions Presented

1. Were the petitioners deprived of their constitutional right to a fair and impartial trial by jury by the trial judge's frequent and continuous interruptions of the orderly presentation of the evidence, and when the trial judge took upon himself the main burden of the cross-examination of the petitioner's main and only witness?

2. Were the petitioners deprived of their constitutional right to a trial by jury and did the conduct of the trial judge cut into the presumption of innocence to which the petitioners were entitled by his constant interruption of the orderly cross-examination of the Government's main witness by counsel for the petitioners and by the trial judge's active and hostile cross-examination of the main witness for the petitioners during the direct testimony of this witness and during the cross-examination of this witness by the prosecutor?

3. In a criminal action where the guilt or innocence of the petitioner depended upon the credibility of a bookkeeper as a witness for the Government and the credibility of an accountant who was the only witness for the petitioners, were the petitioners denied a fair and impartial trial when the trial judge undertook to supplement the evidence by references to his knowledge of accountancy and his thirty

years experience as a lawyer, particularly when the trial judge by his comments and questioning and unnecessary sarcasm tended mainly to destroy the credibility of the witness for the petitioners and to underline inconsistencies in the testimony for the petitioners?

4. Did the active role played by the trial judge in the trial of this criminal cause violate the rights of the petitioners under the Sixth Amendment when the extended cross-examination of the only witness for the petitioners was of such a nature as to communicate to the jury the trial judge's disbelief of the testimony of this witness?

5. In this criminal cause were the functions of the prosecutor and the trial judge merged to the extent that the trial judge became an advocate for the Government and did the trial judge by his questioning pass beyond the immemorial limits set down for Anglo-American tribunals?

6. In the setting of this case and where the jury indicated that it had no chance of reaching an agreement on count number four of the indictment the only count upon which the petitioners were sentenced to prison, was the cumulative effect of the continuous departures from strict judicial impartiality cured by the formal charge of the trial judge stating in substance that the determination of the facts is solely the province of the jury?

7. Was the trial court's supplementary charge to the jury after their inability to agree on count four of the indictment, reversible error?

8. Was the indictment of these petitioners on a charge of a conspiracy to obstruct justice such a stretch on the

part of the prosecutor of the quasi-judicial power lodged in him and calling for this Court's supervisory power over the modes of conducting federal criminal prosecutions?

Constitutional Provisions and Statutes Involved

United States Constitution, Amendment VI, provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Title 18, United States Code, Section 1001, provides as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 1503, provides as follows:

> "Sec. 1503. *Influencing or injuring officer, juror or witness generally.*
>
> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 371, provides in pertinent part as follows:

> "Sec. 371. *Conspiracy to commit offense or to defraud United States.*
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * * *"

Summary Statement of Matters Involved

The petitioners were officials of Local 649, United Automobile Workers of America, A. F. of L. In the first three counts of the indictment filed against the petitioners, they were charged with the substantive offenses of making false statements in matters within the jurisdiction of the Internal Revenue Service in violation of 18 U. S. C. Sec. 1001. These charges for substantive offenses were based upon the following facts.

The main witness for the Government was Mrs. Mildred Warshauer, who was hired as a bookkeeper for Local 649 in May 1954. At that time, one John Dioguardi was President of the Union; petitioner Curcio was Secretary-Treasurer, and petitioner Baker was Business Agent and Administrator of the Welfare Fund (62a-63a*). This witness testified that she was instructed by the petitioner Curcio to keep "accurate records" (108a) and when she found that the books and records were in very poor condition she

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* References are to appellants' appendix.

began a reconstruction of the books of account for the years 1952 to May 1954 (66a-67a).

In September 1954, John Dioguardi was supplanted as President by the petitioner Curcio who continued in that position until the beginning of 1957 (63a).

On the morning of December 23, 1954, about two months after Dioguardi lost his position with the Union, Mrs. Warshauer came to work at 9 o'clock and "found that the place had been broken into during the night and it was in a general mess" (68a). She testified that the safe had been opened and everything in the safe had been thrown out (116a). The police were informed. She testified, however, that although the bank statements had been opened up and checks were all over the place, she found out subsequently that there were some statements missing and some cancelled checks, but that all the books and records which she had reconstructed for the Local and Welfare Fund were intact (70a-71a).

In the Summer of 1955, the Union retained a new accountant, Morris Finkelstein (73a-130a). Mr. Finkelstein appeared as the main witness for the petitioners. Mr. Finkelstein had been a certified public accountant for 26 years (295a). He could not find any books and records of the Union prior to June 1, 1953. He testified he questioned Mrs. Warshauer about the missing records, and he was told by her that there had been a robbery in December 1954, and she did not know whether those records were missing as the result of the robbery (303a). Mr. Finkelstein testified that he did not have sufficient records available for the purpose of filing information returns for the years prior to the fiscal year ending May 31, 1954 to be sub-

mitted on a form 990 filed by unions among other organizations which are deemed tax exempt. Consequently, he filed these forms 990 for the fiscal years ending May 31, 1955 (306a).* He attached to the information returns for 1954 affidavits dated September 21, 1955 signed by the petitioners. These affidavits were typed in the office of Mr. Finkelstein (307a). The affidavits stated that the Union had never filed information returns before 1954, was unable to file for prior years, because "* * * Although said organization was formed in 1952, returns for prior years cannot be filed as the necessary records were destroyed during a robbery of the union offices in December 1954, which robbery was reported to the Police Department." These sworn statements which the Government contended were false furnished the basis for the first and second counts in the indictment (18a-19a, 28a).

The basis for the third count was a letter dated November 3, 1955, signed by the Petitioner Curcio, and given to an Agent of the Internal Revenue Service. In November 1955, a Special Agent of the Internal Revenue Service called on the petitioner Curcio, explained he was conducting an investigation of the tax liability of John Dioguardi for the years 1948 through 1952. The Agent stated it was necessary for him to see the books and records of Local 649. The accountant for the Union was present at that time, dictated a letter accounting for the non-production of the requested books and records, which was typed by Mrs. Warshauer and signed by the petitioner Curcio, and given to the Special Agent (21a-24a, 27a, 33a). The concluding paragraph of that letter was as follows: "We are unable

* The union's right to an exemption was never questioned by the Internal Revenue Service.

to locate any other records prior to the dates set forth above. Such records may have been lost in a robbery which took place December 23, 1954" (Government's Exhibit 3, 30a).

In connection with the above counts, the trial judge held as a matter of law that the statements made by the petitioners were material statements (390a).

The attorney for the petitioners moved for a dismissal of these three counts upon the ground, among others, that it was not alleged in the indictment, nor did the proof establish, that the statements claimed to be false were material. The attorney for the petitioners contended in the trial court that the materiality of the false statements was an essential element of the crime under 18 U.S.C. 1001. The trial judge denied the motion recognizing that there was a difference of opinion between the various circuits, but stating that if materiality of the false statements were an essential element of the crime, the materiality of the statements is an issue for determination by the Court and not by the jury, and that in this case the Court finds that the statements, if false, were material (390a).*

The fourth count of the indictment charged a conspiracy to influence and obstruct and impede justice in violation of Title 18 U.S.C. Sec. 1503. This count was based upon the following testimony.

On March 29, 1956, a Special Grand Jury was impanelled in the Southern District of New York to investigate viola-

* Citing, *United States* v. *Silver*, 2 Cir., 235 F. 2d 375 (trial judge, however, in that case submitted the issue of materiality to the jury); cf., *Freidus* v. *United States*, App. D.C., 223 F. 2d 5[illegible]; *Weinstock* v. *United States*, App. D.C., 231 F. 2d 699.

tions of federal laws in the garment and trucking industries and the activities of John Dioguardi (8a-9a).

In November 1956, *subpoenas duces tecum* were served upon the petitioners calling for the production of books and records for the Union and Welfare Fund from 1950 on (9a, 95a-96a).

Mrs. Warshauer, the Government witness, helped to gather the books and records available at the Union's office for delivery pursuant to the subpoenas. This took place on Election Day, the day before the return date of the subpoenas. The books and records that she assembled were packed in cartons. The accountant, Mr. Finkelstein was present at the time besides the petitioners, and she left the office at 1:30 P.M. Mr. Finkelstein, she testified, was still working on some of the records (161a). She prepared a receipt for the records to be signed by the United States Attorney's Office (161a). Some of the books and records prior to April 1956 had been delivered previously to the office of the accountant, Mr. Finkelstein (345a). Arrangements were made for the petitioner Baker to obtain these records in the possession of the accountant which were to be delivered together with the books and records that had been packed in the cartons (180a, 149a).

The three cartons of books and records taken from the office of the Union were placed in Baker's car. Petitioner Baker drove to 52nd Street and 7th Avenue where he locked and parked the car for the night (240a). The following morning, at about 8 o'clock, petitioner Baker went to his car and found that it had been broken into, the ventilator window shattered with a hole about 3 inches in diameter, and that the cartons of records and his topcoat had been

stolen (243a-244a). Petitioner Baker promptly reported this to the United States Attorney, whose representatives made an immediate investigation. They examined the car of petitioner Baker, found that "The ventilator window on the right front door was broken, a hole punched into it" (271a) and that the opening was between 2 and 3 inches in diameter through which a hook could be inserted to open the door (273a).

Both petitioners were then subpoenaed to testify before the Grand Jury to explain the non-production of the subpoenaed books and records. The petitioners appeared voluntarily and waived any claim of constitutional privilege (173a, 267a). Both petitioners testified before the Grand Jury that they had nothing to do with the theft of the records and had no reason to suspect that such theft would occur (199a-281a). Petitioner Curcio testified that he did not even know where petitioner Baker was going to be on Election Night (199a).

Mr. Finkelstein testified before the Grand Jury and produced work papers, work sheets and other records relating to the Union (328a).

After the jury trial, the petitioners were convicted although the jury had indicated, after many hours of deliberation, that they had little chance of agreeing on a verdict on count four (446a). After supplemental instructions by the trial judge, the jury returned a verdict of guilty as to all counts and of both petitioners (449a).

The petitioners were sentenced to a prison term of two years on count four (the conspiracy charge) (454a). Imposition of sentence on counts one, two and three was suspended and the petitioners placed on probation for a period

of three years to commence upon their discharge from service of sentence on count four (454a). During the period of probation, the petitioners were enjoined from serving as officers or employees of any labor organization and as labor relations consultants.

On appeal to the Circuit Court of Appeals, the convictions of the petitioners were affirmed.

At this point, reference should be made to two statements appearing in the opinion of Circuit Judge Clark. The opinion states that the petitioners did not appeal their convictions of substantive charges of making false statements (Opinion, Appendix p. 2a). The notice of appeal specified that the appeal was taken from the entire judgment (456a-457a). The opinion also points to the fact that petitioners did not personally take the stand (Opinion, Appendix p. 2a). This statement was of course true. However, as pointed out above, the petitioners voluntarily appeared before the Grand Jury and waived any claim of constitutional privilege and material portions of their testimony became part of the Government's case (174a-267a).

As to the Conduct of the Trial Judge (Questions Involved 1-6)

The petitioners contend that they were denied a fair and impartial trial because the trial court adopted the role of a prosecutor and constantly injected himself into the proceedings, all of which had the effect of giving to the jury the impression that the trial judge was of the fixed opinion that the petitioners were guilty and should be convicted.

It is difficult, if not impossible, to recreate the living scene of this criminal trial. The printed record can not reproduce the tone of the trial judge's questioning or the facial expressions indicating disbelief of or disgust with the testimony of petitioners' main witness. However, we believe that this cold record adequately paints the grim picture of a trial judge throwing the "weight of his great influence" on the side of the prosecutor.

The Government's case depended in the main upon the testimony of Mrs. Mildred Warshauer, who testified that she was a bookkeeper for 28 years. The main witness for the defense was Morris Finkelstein, a certified public accountant for approximately 26 years (295a). Their testimony did not raise any technical accounting questions but solely one of credibility.

Despite this, very early in the trial, the trial judge directed the attention of the jury to his expert qualifications as an accountant and that, therefore, he was in a better position to judge the accuracy of the testimony of a bookkeeper or an accountant. At page 105 of the record, the following statement by the trial judge demonstrates that the trial judge felt that his role was something more than a judge:

> "Mr. Kove: You are the Judge here.
>
> The Court: No. I will give you my position and my background. You know, I worked part of my way through college as a bookkeeper, and then I thought, too, that it would be good, to be a commercial lawyer, to know the language of the businessman, so I thought I ought to know and understand something about accounting. So I studied a little bit about accounting. And when I hear this kind of a story I

just relate myself to it. I know when I was first hired, the first accountant interviewed me, too. Well, what can I do * * * "

Of course, the trial judge could have attempted to maintain that detached and impartial attitude necessary to preserve a proper atmosphere and permit competent counsel for the Government and competent counsel for the petitioners to conduct the trial. He did not.

During the direct testimony of the Government's main witness, Mildred Warshauer, the trial judge assumed the role of the prosecutor and conducted portions of the direct examination of this witness (67a, 84a, 85a). His form of questioning immediately indicated his partiality for the Government witness. We have this illustration. There was testimony given by the witness Mildred Warshauer that she was told by the petitioner Curcio to prepare a duplicate set of books (80a). This furnished an occasion for the trial judge to take over direct examination of this witness for the purpose of establishing that the net result was to place an additional burden upon her (84a), because of the fact that the books then in use had plenty of room for additional entries (86a).

The Court on other occasions continued to take over parts of the direct examination (89a, 90a, 92a).

During the cross-examination of this Government witness by the attorney for the petitioners, the Court frequently interrupted defense counsel. The trial judge by his questioning at that point destroyed the effect of the cross examination and underlined the trial judge's opinion of the high quality of the testimony of the Government's wit-

ness (107a, 112a, 114a, 119a-122a, 123a). A clear example of this appears at page 139a.

The Government witness Mildred Warshauer testified that she was given instructions to write up a new set of books as of April 1, 1956 (139a). There was a question as to whether or not such new books were necessary in view of the merger between Local 649 and Local 130. According to the witness Mrs. Warshauer, she was told by the petitioner Curcio to write up the new set of books as of April 1, 1956 by reason of the spin-off of Local 130 (139a). The trial judge interrupted the cross-examination by counsel for the petitioners and asked the following questions at page 140a (all italics ours):

"By the Court:

Q. *As a bookkeeeerer of obvious competence*— A. Thank you.

Q. *—and of long experience*, do you think that it was necessary, in order to truthfully reflect the financial condition and all the transactions of the surviving local, to set up a new set of books when 130 was— A. No, I think a financial statement would have reflected that.

Q. Do you think it was necessary to get up new books for that purpose? A. No, I don't.

Mr. Kove: I object to that, your Honor, as calling for a conclusion.

The Witness: No, a financial statement would show the same thing.

Mr. Kove: I respectfully object to that question and answer.

The Court: Objection overruled. That was the question given to the lady and the question was in her opinion does she think it was necessary.

Mr. Kove: I respectfully object.

The Court: All right. You have got your objection.

Mr. Kove: Do I have the Court's permission to state further grounds?

The Court: You can put them on the record. Do you want to waste time now?

Mr. Kove: I would like to put them on the record.

The Court: Yes.

May I ask you this, too: when the time came early in 1955 that you were relieving the safe of the—

The Witness: Of the books.

The Court: —Of the excess weight that it was carrying, because it was a small safe or a large safe, whatever it was, but it had more records and more books in it than it could comfortably hold, when that time came—you said it was sometime in 1955—

The Witness: Yes.

The Court: —what did you do with the general ledger for the period up until that time?

The Witness: I put it in the transfer case, as I was instructed to do.

The Court: The whole general ledger?

The Witness: The sheets up until the close of 1954.

The Court: And then what did you do?

The Witness: I put it in that transfer case. The transfer case—

The Court: No, forget the transfer case. Then what did you do? Open up a new ledger?

The Witness: Yes.

The Court: And after you opened up the new ledger how much space did you save, if you know?

The Witness: None.

The Court: None at all?

The Witness: No.

The Court: All right. Next question."

The trial judge persisted in interrupting the cross-examination of this witness by counsel for petitioners. During this cross-examination, the trial judge made it clear to the jury that the quality of this witness's testimony was excellent and the trial judge characterized the Government witness as an expert. The following appears at page 149a:

> "The Court: But, then, you did testify too, did you not, that it was not necessary to make that change?
>
> The Witness: No, it wasn't necessary to set up all new records.
>
> The Court: All right.
>
> Mr. Kove: I respectfully except to that question: it calls for a conclusion, your Honor.
>
> The Court: *This lady is an expert witness.* (Italics ours)
>
> Mr. Kove: On the question of 'necessary to make a change' it might have many connotations. I don't want to argue. I want an exception, your Honor.
>
> The Court: From an accounting or bookkeeping point of view, in order to truly and accurately reflect the operation and the conditions and the state of affairs of Local 649, after the shops that had been in Local 130 were spun-off and followed Davidoff, was it necessary to close out the old books and open up a new set of books?
>
> The Witness: No. As I said before, the financial statement and the journal entry would have taken care of it.
>
> The Court: That is the only question."

A very startling and conclusive demonstration that the trial judge by his questioning and by his comments had assumed the role of an expert witness appears at page 150a. At page 150a, the Government witness was asked

whether it was proper procedure to prepare such new records as of April 1, 1956 and the witness answered as follows:

> "A. I wouldn't say it was improper. *It just—as the Judge stated*, it wasn't necessary; but it wasn't my place to say whether it was or wasn't." (Italics ours)

The trial judge quickly, however, attempted to draw a distinction by remarking that "he didn't make such a statement" but "inquired" about that (150a). However, if the Government's witness misunderstood the trial judge's remarks, what was the effect on the jury?

Despite this, the trial judge continued to interrupt counsel for the petitioners by propounding other questions to emphasize the testimony of the Government witness that it would have been more convenient to continue with the old books and records and which would have eliminated a lot of work for her (151a).

The most objectionable performance of all was the trial judge's constant interference with the presentation of the defense. Although it is usual for cross-examination to be conducted after the end of the direct testimony of a witness, all such customary rules of procedure were ignored. The trial judge persisted in interrupting the direct examination of Morris Finkelstein, the main witness for the petitioners, and to cross-examine the witness before counsel for petitioners concluded his questioning (297a, 299a, 303a). Most of these interruptions were for the purpose of emphasizing the trial judge's high opinion of the quality of the testimony of the witness for the Government and to ridicule the main witness for the petitioners and to

destroy his credibility. By the trial judge's questioning, the trial judge compelled the witness Finkelstein to admit that the witness for the Government was a competent and able bookkeeper (304a). On the other hand, the questions directed to the witness for the petitioners were for the purpose of underlining inconsistencies and destroying his credibility. The trial judge referred with sarcasm to the testimony of the petitioners' witness to the effect that he looked for files instead of asking the Government's witness to do so (304a-305a). When counsel for the petitioners questioned his witness about the affidavits, which are the subject of counts one and two (307a), the trial judge interrupted this direct questioning for the obvious purpose of creating the impression to the jury that there was something mysterious because the affidavits were typed in the office of the accountant Finkelstein rather than by the witness Mildred Warshauer (307a-308a).

Other instances of an extended cross-examination by the trial judge of the witness Finkelstein during his direct examination appear at pages 312a-315a.

Although counsel for the petitioner continued to object to these interruptions and although at one point the trial judge promised to abstain from further cross-examination (315a), the trial judge continued to interrupt the direct examination with his cross-examination (316a-317a, 321a, 323a, 325a). Again and again the questioning was hostile and sarcastic. At page 325a, the following appears:

> "By the Court:
>
> Q. What do you mean by you brought the books up to date? A. Well, you see, your Honor, an audit was made every three months and the normal period

of audit was October, at which time we audited the books up to September 30. This was in November, and in order to have everything ready—available, ready for whoever was going to examine the books, I brought the books up to the end of October.

Q. What do you mean, you brought the books up to the end of October? You weren't the bookkeeper, were you? A. No, but we did certain entries on the books.

Q. You made journal— A. Journal entries, certain ledger entries. I made sure that everything—that the—

Q. Did you find that Mrs. Warshauer was delayed in her work? A. No, her work was usually up to date. But this was the early part of November, and normally it takes a week or 10 days before the books—the bank statement is reconciled and the books are posted, the usual routine. This was maybe—I forget; can you—I think this was November 5th or 6th. The bank statement would just have arrived at that time.

Q. And that's what you— A. It probably came in that Monday.

Q. And that is what you came in for: the reconciling of the— A. No, I came in primarily to help them get the books ready to be delivered.

Q. This writing up that you talk about— A. It was to make certain entries in the books.

Q. What do you mean by 'certain entries'? A. I do not recall exactly what entries I made. I believe I posted the general ledger for the month of October.

Q. Was that your job? A. Not as a rule.

Q. Well, why did you do it this time? A. Because the books were to be delivered and I wanted to see that the books were up to date.

Q. Wasn't Mrs. Warshauer there? A. She was busy getting records out of files. She was helping them assort all the various voluminous records that we kept.

Q. So you were kind of assistant-bookkeeper? A. For that—

Q. Assistant to Mrs. Warshauer? A. At that time, for that date, yes.

The Court: All right."

During the cross-examination of the witness by the Assistant United States Attorney, the trial judge took over a great deal of the cross-examination. In fact, out of a total of approximately 360 questions asked upon cross-examination, the trial judge asked 116. At many points in the record, the prosecutor would ask a few questions and this would be followed by questions of the trial judge. This judge-prosecutor relay team continued this manner of cross-examination. (See for example pages 362a-382a.)

The hostility of the trial judge's cross-examination appears in the record on numerous occasions.

When the Assistant United States Attorney began to question the witness concerning the books that were removed from the union to the office of the accountant, the trial judge began an extended cross-examination of the size of the office space occupied by Mr. Finkelstein for the purpose partially of demonstrating that it would have been unreasonable to expect an accountant to store records of the Union (346a-350a). This, despite the fact, that all this testimony was actually irrelevant. The petitioners claimed that the records in the accountant's office were packed, picked up and placed in the automobile from which they were stolen (326a).

Nevertheless, witness was questioned in detail as to the measurements of each room, the number of private offices, the number of square feet in each office, the distance between offices, the number of filing cabinets, the size of the conference room, the size of the package containing the books of the Union delivered to the accountant (346a-350a).

At another point in the record, the trial judge expressed amazement that the accountant did not deliver a receipt for the books to the Union (350a). The trial judge mentioned the fact that he had practiced law for thirty years before becoming a trial judge, clearly giving the jury the impression that as a matter of self-protection the witness should have given the Union a receipt for any papers delivered to him (351a, 352a-353a).

There was further cross-examination at pages 363a, 365a, 367a, 369a, 371a, 374a, 375a and 377a. At one point, the trial judge referred sarcastically to defense witness Finkelstein (377a):

> "The Court: He is an expert now. He is a great CPA."

The trial judge continued to interrupt the cross-examination by the Assistant United States Attorney and cross-examined the defense witness (378a, 379a). Again at 380a, the trial judge ridiculed the assertions of this witness and again assumed the role of an expert. The following takes place at pages 380a-381a:

> "The Court: Mr. Kove, may I tell you this, that an accounting firm in their notes to financial statements always gives statements of the opinions which, while they are not legal opinions, except in cases where legal opinions are required they will call upon

company counsel or their own counsel to get the legal opinions, but the notes to financial statements will require frequently analysis of certificates of incorporation, of limitation on authority to borrow, on power to declare dividends, limitations on debentures outstanding, as to authority to declare dividends, ratios as between assets and current liabilities. Accountants meet that problem every day, and when they are called upon to make a statement and they find a problem that they can't cope with because it is a legal problem, then they have a right to call upon company counsel to give an opinion.

Mr. Kove: Your Honor, all of which is probably so, I don't know. But it certainly has nothing to do with our issue here.

The Court: This witness has made a statement that it was impossible, and we want to know what did he try to do?

Mr. Kove: If your Honor please, I respectfully submit—

The Court: Did he call, did he communicate with counsel? Did he speak to Mr. Curcio? Did he speak to Mr. Baker? Did he do anything?

Mr. Kove: Your Honor, I respectfully except. May I have the right to object, your Honor? I don't want to get into colloquy with you. I think it is improper questioning. I respectfully submit that to you, and I want the ruling.

The Court: All right, your objection is overruled.

Mr. Kove: Thank you, sir."

Another interruption appears at page 382-a.

Counsel for petitioners repeatedly objected to the trial judge's questions (84a, 105a, 140a, 149a, 305a-306a; 314a-315a, 350a, 353a, 377a, 380a-381a). At page 315a, the trial judge promised to abstain conceding it was the function of

the United States Attorney to cross-examine. Despite this promise, the cross-examination continued vigorously, as appears from the page citations following page 315a. The trial judge pretended that the purpose of his vigorous cross-examination was to clarify the issues of fact (351a). However, this conclusion is not supported by either the nature or the extent of the cross-examination.

The Court of Appeals in its opinion recognized that the trial judge's persistent examination of the witnesses and his interference in the conduct of the case was to an extent greater than was desirable to assure the wholly impartial administration of justice (Opinion, Appendix, p. 3a). However, the furthest the Court of Appeals would go was to state that the trial judge was close to error and held that in view of the charge the Court held the petitioners were not deprived of a fair trial.

As to the Trial Court's Supplementary Charge to the Jury After Their Inability to Agree on Count Four of the Indictment (Question Presented 7)

In the main charge to the jury, the trial court gave a proper instruction as to the duty of jurors with respect to agreeing upon a verdict (431a-432a).

The jury retired to deliberate at 5:15 P.M. (438a). Between 7 and 8 o'clock they had dinner, and then continued their deliberations until 10:15 P.M., at which time the jury made the following request:

> "Jury requests Baker's and Cureio's grand jury testimony regarding car broken into. Pictures of

car. Jury also request definition of reasonable doubt in regard to Count No. 4" (443a).

After receiving part of the information called for (the jury having withdrawn the request for the grand jury minutes), the jury retired to deliberate at 10:55 P.M., and ten minutes later sent the following note:

> "Your Honor, jury agreed on first three counts. Can not reach agreement on Count No. 4, with little chance of doing so. Request further instructions from Court" (446a).

In response to this note the trial court made some observations which were of little importance, and then continued as follows (447a-448a):

> "And I want to read to you what the Supreme Court had to say on the question of jury verdicts:
>
> * * * that although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's argument; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority * * *.

"While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. *It certainty cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the juryroom with a blind determination that the verdict shall represent his opinion of the case at the moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself.*

• • • •

Now, that is the guide post for jury deliberation that the Supreme Court set down many years ago and which is still the guide post for jury deliberation" (Emphasis added).

Thereafter, the jury left the courtroom at 11:20 P.M. and undoubtedly applying the "guide post for jury deliberation that the Supreme Court set down", returned at 12:49 A.M. with a verdict of guilty on all counts (449a).

Reasons for Granting the Writ

I.

The basic questions in this case are whether the trial judge's active participation in this case by his persistent examination and cross-examination of the witnesses and by his comments and remarks exceeded the limits for the

trial judge's role in maintaining in the eyes of the jury the court's position of impartiality. These questions are of great importance in the administration of Federal justice. Not since the decision of this court in *Quercia* v. *United States*, 289 U. S. 466 has there been a decision of this Court defining the limitations of the role of the trial judge. In the *Quercia* case *supra* this Court reversed a judgment of conviction because the trial judge in his instructions to the jury called the attention of the jury to the fact that during the testimony of the defendant he wiped his hands and which in the opinion of the trial judge was "almost always an indication of lying". The trial judge carefully pointed out to the jury that his opinion was not binding upon them and they were not required to agree with him. Nevertheless, this Court reversed the judgment of conviction stating that: "The influence of the trial judge on the jury is 'necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.' *Starr* v. *United States*, 153 U. S. 614, 626; *Hickory* v. *United States*, 160 U. S. 408, 421-423. He may not charge the jury 'upon a supposed or conjectural state of facts, of which no evidence has been offered.' *United States* v. *Breitling*, 20 How. 252, 254, 255. It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf. *Hicks* v. *United States*, 150 U. S. 442, 452; *Allison* v. *United States*, 160 U. S. 203, 207, 209, 210."

It is, of course, true that a district judge in the Federal court is not a mere "moderator" and may ask questions to elicit or clarify facts, but "he is decidedly not a prosecuting attorney." *United States* v. *Brandt*, 2 Cir., 196 F. 2d 653, 655. However, because of the ever present and serious threat that a jury's determination may be influenced by what it interprets to be the court's own opinion, this prerogative must be exercised with caution. *United States* v. *Marzano*, 2 Cir., 149 F. 2d 923. He must remain "the judge, impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested." *United States* v. *Brandt*, *supra*, 2 Cir., 196 F. 2d 653, 655. The trial judge may not assume the role of an expert witness. *United States* v. *Woods*, 2 Cir., 252 F. 2d, 334.

The trial judge may not be argumentative in his comments and he cannot be an advocate and urge his own view of the guilt or innocence of the accused. *Blunt* v. *United States*, App. D.C., 244 F. 2d 355. The trial judge may not indulge in unnecessary sarcasm. *Williams* v. *United States*, 9 Cir., 93 F. 2d, 685, 689. The trial judge may not take upon himself the burden of cross-examination of a witness for a defendant when the Government is represented by a competent attorney and a trial judge may not conduct the examination in a manner hostile to the accused and his witnesses. *Adler* v. *United States*, 5 Cir., 182 F. 464, 472.

In the case at bar, the above mandate of judiciousness was breached on numerous occasions and by various means.

(1) The trial judge assumed the role of an expert witness. He referred to his qualifications as a bookkeeper and

his knowledge of accountancy (105a) to support the testimony of the Government witness (105a). He referred to his 30 years experience as a practising attorney (350a) for the purpose of demonstrating the negligence or lack of credibility of the main and only witness for the petitioners, because of his neglect to obtain a receipt for the books the Union allegedly turned over to him (350a-351a). See also, his comments at pages 380a-381a.

(2) The trial judge made commendatory remarks about the witness for the Government and sarcastic and derogatory remarks concerning the witness for the petitioners. His questioning of the Government witness (140a) was preceded by a statement such as this: "As a bookkeeper of obvious competence * * * and of long experience, do you * * *." On the other hand, the trial judge referred sarcastically to the witness for the petitioners, stating at page 377a: "The Court: He is an expert now. He is a great C.P.A." What is most improper is the fact that during the direct examination of the main witness for the petitioners the trial judge interrupted the direct examination for the purpose of compelling the witness for the petitioners to concede that the Government's witness was a competent bookkeeper (304a). The witness for the petitioners, put in this position, would not have dared in the eyes of the jury to contradict the trial judge. This form of questioning and these comments were wholly improper. In *Williams v. United States*, 9 Cir, 93 F. 2d 685, a judgment of conviction was reversed because of the reason, among others, that a trial judge indulged in unnecessary sarcasm in his questioning of a bookkeeper who testified in favor of the accused (p. 689).

(3) The trial judge continuously interrupted the examination of witnesses and the interruptions were at such times and for such purposes that the jury undoubtedly received the impression that the trial judge was of the fixed opinion that the petitioners were guilty and should be convicted. Throughout the entire trial, the trial judge exhibited a prosecutor's zeal inconsistent with the detachment and aloofness which courts have again and again demanded, particularly in criminal trials. The trial judge became the advocate and he took "on the role of a partisan". *United States* v. *Magzano*, 2 Cir., 149 F. 2d 923, 926 (Opinion by Judge Learned Hand).

In *Blumberg* v. *United States*, 5 Cir., 222 F. 2d 496, 501, the Court stated: "* * * it is far better for the trial judge to err on the side of abstention from intervention in the case rather than on the side of active participation in it, especially when the major part, if in all of his interruptions and interventions, though by chance rather than by design are, or seem to be on, or tending to be on the side of the Government."

Not once during the entire trial did the Court interrupt the proceedings and examine any witness for the purpose of aiding the defense or breaking down the prosecution testimony. The trial judge took upon himself the burden of the cross-examination of petitioners' witness, although the Government was represented by a competent attorney. The trial judge conducted the examination in a manner hostile to the petitioners and the witness for the petitioners. It has been held that a cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice an accused when it is conducted

by the trial judge. *Adler v. United States*, (5 Cir.) 182 F. 464, 472.

The orderly presentation of the evidence for the Government and the accused was prevented by the constant and excessive interruptions. While counsel for the petitioners was cross-examining the witness for the Government, the trial judge interrupted on numerous occasions for the purpose of rehabilitating the witness and destroying any concessions or admissions that the cross-examiner might have obtained. The trial judge interrupted the direct examination of petitioners' only witness with 78 questions, which were in the form of cross-examination. On cross-examination of this same witness, the prosecutor and the judge took turns in their questioning. The result was an unusual judge-prosecutor relay team.

As a matter of statistics, this record shows that the trial judge asked a total of 335 questions. On direct examination of the Government witness, the trial judge propounded more than one-half of the number of questions put to her by the prosecuting attorney. On cross-examination, the Court frequently interrupted defense counsel and put 51 questions. The witness for the petitioners was confronted by the Court with 201 questions—78 on direct examination and 123 on cross-examination.

We agree that statistics are of little value in the determination of the questions presented and we do not intend to urge any quantitative test. However, in this criminal cause we have a pattern of consistent hostile intervention by the trial judge which we believe is without precedent. The hostility of the trial judge towards the petitioners and their witness and the form of the interruptions, the

nature of the comments and the remarks and his entire conduct was bound to influence the jury and cut into the presumption of innocence to which the petitioners were entitled. The judge was clearly exhibiting a prosecutor's zeal inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. In this case, the functions of the trial judge and the prosecutor merged. The partisan intervention of the trial judge undoubtedly produced the impression in the minds of the jury that the judge was of the fixed opinion that the petitioners were guilty. Appellate courts have long recognized that the seeds of prejudice consistently sowed throughout the trial cannot be dispelled from the minds of the jury by a mere stereotyped statement in the charge. *Quercia* v. *United States,* 289 U. S. 466, 472. The cumulative effect of departures from strict judicial impartiality cannot be cured by a formal charge. *Blumberg* v. *United States, supra,* 5 Cir., 222 F. 2d 496. It was certainly of no help to the petitioners that on several occasions the trial judge struck out his comments. If the remarks and comments were improper, then they should not have been made in the first instance. This is not the case where improper comments or remarks were made by a prosecutor or by a witness. Nor did it help any that at one point the trial judge agreed to abstain from further interruptions or cross-examinations (315a). The trial judge, despite this promise, nevertheless continued (316a, 317a, 321a, 323a, 325a, 351a, 352a, 353a, 363a, 367a, 369a, 371a, 374a, 375a, 377a).

In view of all of the above, it is therefore surprising that the Court of Appeals could find no error although similar conduct furnished the basis for reversal in decisions not

only in the Second Circuit but in other Circuits. See also, *United States* v. *Carmel*, 7 Cir., 267 F. 2d 345; *Hunter* v. *United States*, 5 Cir., 62 F. 2d 217; *United States* v. *Minuse*, 2 Cir., 114 F. 2d 36; *Frantz* v. *United States*, 6 Cir., 62 F. 2d 737; *Barham* v. *United States*, 8 Cir., 14 F. 2d 835; see also, *People* v. *Mendes*, 3 N. Y. 2d 120.

The case was a close one for the jury had indicated at one point that it had little chance of reaching agreement on count number four, the only count upon which the petitioners received a prison sentence (446a).

It is true that public interest requires that persons who have committed crimes be convicted of them. "But the responsibility for producing the evidence which will persuade twelve jurors beyond a reasonable doubt is upon the prosecutor. It is a serious public responsibility, but it is upon the prosecutor and upon him alone. The judge has no part in that task." *Billeci* v. *United States*, App. D.C., 184 F. 2d 394, 403.

It is respectfully submitted that the following conclusion by the Court of Appeals in the *Billeci* case, *supra*, is particularly appropriate in this case: "It is a serious thing for an appellate court to reverse convictions in criminal cases. But the controlling importance is that the law be followed. The rules of law applicable to the function of the judge in a criminal trial by a jury are well settled. No matter what the impulse may be to transgress or evade them under provocative circumstance, they must be observed. This is basic, without exception, and compulsory" (p. 403).

II.

The supplementary charge given by the trial judge after the jury indicated it was unable to agree, was taken from the opinion in *Allen* v. *United States*, 164 U. S. 501. The difficulty, however, is that the argumentative language in that opinion was never intended as a proper charge to be given to a jury. Indeed, it has been held reversible error to use the above quoted excerpts from the *Allen* case as a supplemental instruction to a jury that has been unable to agree, the reason being that they "tended too strongly toward coercion of the minority of the jury to surrender their honest convictions in order to acquiesce in the convictions of the majority."

Stewart v. *United States*, 8 Cir., 300 F. 769, 786.

There do appear, however, to be subsequent decisions in the Eighth Circuit which approved the so-called *Allen* instructions, provided no inquiry is made as to how the jury stands. *Anderson* v. *United States*, 8 Cir., 262 F. 764, cert. denied 360 U. S. 929. The Second Circuit has consistently approved the *Allen* charge. *Dwyer* v. *United States*, 2 Cir., 17 F. 2d 696, cert. denied 274 U. S. 756.

III.

The basis of the conspiracy charge against the petitioners was the contention of the Government that the robbery of the records was a sham and that Baker's tale of leaving his automobile overnight on a midtown street with the subpoenaed records was false. If the petitioners testified falsely before the Grand Jury upon their voluntary appearance, they could of course be prosecuted for per-

jury. In addition, if petitioners destroyed records, such destruction might conceivably constitute a violation of I.R.C. Sec. 145(b). *United States* v. *Patterson*, 219 F. 2d 659. But, what basis was there for a charge of a conspiracy to obstruct justice?

No matter how elastic the conspiracy doctrine may be, it cannot reasonably be stretched to encompass petitioners on the testimony presented in this case. The fundamental requirement is that there must be substantial evidence from which a jury may conclude beyond a reasonable doubt that there was a corrupt agreement to commit the crime charged. In the absence of evidence of an agreement to commit the crime, criminality does not attach to the accused. *Ingram* v. *United States*, 360 U. S. 672, 677-678; *United States* v. *Bellaro*, 2 Cir., 99 F. 2d 781, 783.

There need not, of course, be proof of a formal agreement; circumstantial evidence may suffice. But in this case there is neither direct nor circumstantial evidence to warrant an inference that petitioner Curcio ever concurred with petitioner Baker in any plan to conceal the books and records from the Grand Jury.

Indeed, all of the direct testimony both by the Government's witnesses as well as by the petitioners is that the petitioner Curcio never combined with petitioner Baker to have the records disappear by theft or otherwise. He helped pack the records for the purpose of having them delivered in compliance with the subpoena. The bookkeeper, Mrs. Warshauer, and the accountant, Mr. Finkelstein, assisted in this activity. A receipt was prepared for signature of the United States Attorney, listing the books and records to be delivered. The cartons containing the

books and records were placed in appellant Baker's car with the understanding that he was to deliver them to the United States Attorney's office the following morning.

The fact that the next day petitioner Baker was unable to deliver the records does not warrant an inference that this was pursuant to a corrupt agreement with petitioner Curcio to thwart compliance with the Grand Jury subpoena. If we take the most extreme view of petitioner Baker's testimony as to the theft of the records and reject it completely, despite the physical facts supporting him, the Government's case, nonetheless, remains deficient of evidence upon which to base an inference of conspiratorial complicity on the part of petitioner Curcio.

To infer a partnership in criminal purposes when the testimony is to the contrary, would be to substitute surmise and conjecture in place of proof. It is no answer to say, as did the trial court in its charge to the jury (415a), that conspirators do not go out on the highways and announce their criminal schemes. That is undoubtedly true. But it does not dispense with the settled rule that "conspiracy is an affirmative act, measured by the mutual understanding of the participants" as evidenced at least "by implication from conduct." *United States* v. *Mack*, 2 Cir., 112 F. 2d 290, 292-293.

At the trial, the Government was constrained to rely on tenuous inferences of conspiracy emanating from peripheral circumstances of a suspicious character. Suspicion, however, is not proof.

Certiorari should be granted so that a determination can be made whether the indictment of these petitioners on a

charge of a conspiracy to obstruct justice was such a stretch on the part of the prosecutor of the quasi-judicial power lodged in him and calling for this Court's supervisory power over the modes of conducting federal criminal prosecutions.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

July 5, 1960.

Respectfully submitted,

SAMUEL MEZANSKY,
Counsel for Petitioners.

APPENDIX

(Opinion of United States Court of Appeals, Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 309—October Term, 1959.

(Argued May 10, 1960 Decided June 7, 1960.)

Docket No. 26050

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH CURCIO and GEORGE BAKER,

Defendants-Appellants.

Before:

CLARK, MOORE, and FRIENDLY,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Alexander Bicks, *Judge*.

Joseph Curcio and George Baker appeal from their conviction of conspiring to obstruct justice in violation of 18 U.S.C. §1503.

SOLOMON A. KLEIN, Brooklyn, N. Y., *for defendants-appellants.*

STEPHEN E. KAUFMAN, Asst. U. S. Atty., S. D. N. Y., New York City (S. Hazard Gillespie, Jr., U. S. Atty., and David R. Hyde, Asst. U. S. Atty., New York City, on the brief), *for appellee.*

Appendix

CLARK, *Circuit Judge*:

The defendants are officials of a labor union, the income tax liability of whose president, John Dioguardi, was under investigation by the government, and this prosecution grew out of the disappearance of union books and records desired for examination in these investigations. Defendants are appealing their conviction of conspiring to obstruct justice in violation of 18 U.S.C. §1503, but have not appealed their convictions of substantive charges of making false statements in a matter within the jurisdiction of the Internal Revenue Service in violation of 18 U.S.C. §1001. These false statements were to the effect that the union books and records were stolen from the union offices in 1954, although an attempted robbery had in fact left them untouched. The conspiracy charge involved the final disappearance of this and other evidence in 1956, after defendants had been subpoenaed to produce it. Their claim was (although they did not personally take the stand) that it had been stolen from Baker's car parked on the street overnight after they had assembled it for production before a grand jury, and that the left front windbreak panel window of his car had been broken, leaving a three-inch hole. This hole, however, was so small that a tool or device would have been necessary to open the door. In addition to these incriminating facts, the government at the trial produced other evidence of attempts to conceal, and false statements as to the missing records, all pointing to the guilt of the accused and as a whole constituting an adequate basis for the jury's verdict of conviction. *United States* v. *Manton*, 2 Cir., 107 F. 2d 834, 839, certiorari denied *Manton* v. *United States*, 309

U. S. 654. Hence the case was properly left to the jury. Further, the judge committed no error in instructing the jurors in the language of *Allen v. United States*, 164 U. S. 492, 501, on the desirability of seeking agreement when they reported disagreement and asked for further instructions. *Dunn v. United States*, 2 Cir., 17 F. 2d 696, certiorari denied 274 U. S. 756; *United States v. Samuel Dunkel & Co.*, 2 Cir., 173 F. 2d 506, 509.

The only matter which gives us pause is the trial judge's persistent examination of witnesses and his interference in the conduct of the case to an extent greater than seems desirable to assure the wholly impartial administration of justice. It is one of the glories of federal criminal law administration that a district judge is more than a moderator or umpire and has an active responsibility to see that a criminal trial is fairly conducted. Hence he will often have a duty to participate actively to that end; but he must not interfere for a merely partisan purpose or permit even the appearance of such an interference. Nor should he take the course of the trial out of the hands of competent attorneys, nor show by sardonic or sarcastic remarks his own view of the evidence. There were occasions here where the judge came close to error, and we are constrained to say that it would have been the part of wisdom for him to have refrained from such active participation. Yet he constantly admonished the jury of their final responsibility and did this again explicitly in the course of a fair charge. Under all the circumstances we do not think the accused were deprived of a fair trial. *United States v. De Filla*, 2 Cir., 257 F. 2d 835, 839, certiorari denied 359 U. S. 915; *United States v. Brandt*, 2 Cir., 196 F. 2d 653, 655.

Affirmed.